



IN THE COMPANIES TRIBUNAL OF SOUTH AFRICA, PRETORIA

CASE NO: CT005Jun2018

In the matter between:

Southern African Music Rights Organisation NPC (SAMRO)
(1961/002506/08)

Applicant

and

Samro Construction and Projects (Pty) Ltd
(2012/106461/07)

Respondent

Presiding Member of the Tribunal: Delport P.A.
Date of Decision : 20 September 2018

Decision

INTRODUCTION

[1] The applicant applied for a default order that the respondent be ordered to change its name because it does not comply with, *inter alia*, s 11(2)(b) and/or s 11(2)(c) of the Companies Act 71 of 2008 ("Companies Act" / "Act"). Section 11(2)(c) also seems to have been abandoned in the default application (para 9.3 of the default application affidavit), but it will nonetheless be addressed in this ruling.

- [2] Regulations 142 and 153 of the Companies Act (GNR 351 of 26 April 2011) (“Companies Act regulations” / “regulations”) regulate an application to the Companies Tribunal (“Tribunal”) as well as the application for a default order under certain circumstances.
- [3] The jurisdiction of the Tribunal in this matter is as determined in s 160 of the Companies Act.

BACKGROUND

- [4] On 29 August 2018 the Tribunal made the following ruling (“interim ruling”):

“[24] The reason for effluxion of time from registration of respondent and the time that the applicant became aware of the offending name is not addressed and there is not “good cause” shown therefor.

[25] If an order is sought directing the Companies Commission (sic) to manually change the offending name to 2012/106461/07 (Pty) Ltd, to remove the element SAMRO and to prevent further harm to the Applicant and its trade marks, pending compliance with the order to amend the name, the Companies and Intellectual Property Commission (“CIPC”) should have been cited as a respondent.

[26] Whether an order against the CIPC is competent is doubted, but I make no finding in this regard. It should, however, be added that based on the proposed amendments to the Companies Act, it would seem that it is not an order that the Tribunal can make.”

- [5] A supplementary affidavit was filed on 19 September 2018.
- [6] The reasons contained in that affidavit (paras 6.1-6.4) were basically that the time lapse was due to the respondent not having an online/trading presence and it was not possible to obtain a correct address for contact/service. Also, it is averred that the Companies and Intellectual Property Commission records did not record

the correct address or recorded an outdated address.

- [7] It is also contended by the applicant (para 6.5 of the affidavit) that due to the limited, in its opinion, trading, that there will not be prejudice if the respondent is required to change its name.
- [8] While the above reasons may have some persuasive value, the contention that :
“it cannot be reasonably required by the Companies Tribunal to expect companies, such as the Applicant, to conduct searches/audits of the Register of Companies and Close Corporations (hereinafter referred to as "the Companies Register") on a regular basis.”
- [9] The Tribunal requires none of this. It is the duty of the applicant to ensure that its right, whether in respect of the company name or any other property for that matter is protected and to timeously act if those rights are (apparently) infringed.
- [10] The information is published and in the public domain, purely for the reasons to ascertain possible infringement/s – and may be seen to be a relic of the doctrine of disclosure.
- [11] The applicant refers to *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) in support of its contention that there was “good cause”.
- [12] The *Highly Nutritious Food Company (Pty) Ltd* case has been used in various application and various interpretations were attributed to it. The application of the case is very narrow, and the relevance of the case and its application was discussed in *Value Logistics Limited v Value-Ad Logistics (Pty) Ltd* CT010 Jul2018 of 17 September 2018 and in a text book, as follows:
- “[22] The reason for the requirement that there must be good cause shown why the application was launched at a particular date would appear to be that the person doing business under a particular name, that has been

registered by the Companies and Intellectual Property Commission, is not prejudiced by a belated challenge which could affect the goodwill built up in using the name. See also *Comair Limited vs Kuhlula Training, Projects and Development Centre (Pty) Limited* CT007Sept2014 of 27 February 2015.

- [23] To interpret s 160 in such a manner that an application such as this one is not subject to some restriction as to the time within which it should be lodged, will in my opinion, lead to "...insensible or unbusinesslike results...": *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
- [24] However, in *The Highly Nutritious Food Company (Pty) Ltd v The Companies Tribunal and Others* (91718/2016) [2017] ZAGPJHC (22 September 2017) the Court said (para 18) that: "...Section 160(2)(b) allows any person and at any time to bring an application on good cause shown. This does not refer only to the delay in bringing the application but to show good cause as to why the application must be entertained. The section requires the applicant to furnish a reasonable explanation as to why the application should be entertained by the Tribunal. It does not require an explanation only as to the delay in bringing the application but refer (sic) to the merit of the application as well. It is section 160(1) that prescribes, for a particular category of persons, to launch an application within the period of three (3) months after they became aware of the registration of the name. [19] It is my respectful view therefore that to evaluate good cause, the Tribunal was obliged to look at the whole matter including the merits to determine whether it was in the interests of justice to entertain the application."
- [25] It may be possible that the merits of the application form part of the "good cause" requirement in this context. However, sub-s (2) (a) refers to the period in respect a notice is delivered in terms of the Act and is the alternative to sub-s (2) (a), due to the disjunctive "or". Subsection (2)(b) refers to applications other than under sub-s (2) (a), ie where there was no s 160 (1) notice. Subsection (2) (a) does not require and there is no

implication to that effect, that the merits should be addressed. Subsection (2) therefore only regulates the respective time periods. To require that the merits of the application, which must in any case be addressed in the CTR 142 as provided for in reg 142 in respect of both subsections, to be only evaluated in sub-s (2) (b) in addition to the explanation for the time lapse under “good cause”, is superfluous and unnecessary. The merits will be evaluated by the Tribunal to make a ruling, and if there were no merit in bringing the application, it should be addressed at the ruling/decision stage. The Court also did not, as is clear from paras 18 and 19 of the judgment, require that “good cause” means reasons which justify the granting of the relief sought in the application launched in terms of section 160(1) (as opposed to entertaining the application): see however *Highly Nutritious Food Company (Pty) Ltd v Eat Right Catering Services (Pty) Ltd and Another* (CT014Apr2016) [2017] COMPTRI 101 (24 November 2017) para 24. In addition, s 160 (1) does not prescribe a period of 3 months to bring the application as stated by the Court (para 18). If that were the position, the reasoning may have been more persuasive. Be that as it may, the law now is that the “good cause” requirement does not only refer to the time period, but also the merits, and these would be the “relevant factors” that the Tribunal should take into account in the granting of the relief sought in the application (para 20).

- [26] In respect of the elapsed time period, as a factor in the merits, it is in interest of the respondent company and its creditors and possible prejudice to these parties. If the respondent company was not trading, the possibility of prejudice falls away (para 20) and the *dictum* in the *Highly Nutritious Food Company (Pty) Ltd* case *supra* is therefore authority under these circumstances, and not if the company was indeed trading, which would mean that there should be “good cause” shown for the period elapsed since incorporation and an application in terms of s 160. In this respect it should also be noted that the name of the respondent was approved and registered by the Companies and Intellectual Property Commission and it complied therefore, at least *prima facie*, with s 11. The respondent in an

application under s 160 has, due to the notice of the application in terms of reg 142 (2), knowledge of the application. Failure to respond would, therefore, also be a factor that needs to be taken into account in respect of the determination of “good cause” in the case of a effluxion of time since registration of the company with the offending name and the lodging of the application by the applicant.

- [13] In respect of s 11(2)(b)(i) it is required that a name must not be “confusingly similar to a name, trade mark, mark, word or expression contemplated in paragraph (a)”. The test, which would be the same as “reasonably mislead”, as in the case of passing-off, should be: “. . . a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the goods or merchandise of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a *reasonable likelihood of confusion or deception* is a question of fact to be determined in the light of the particular circumstances of the case.” *Adidas AG and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) para 28. It is not necessary to find that all or most consumers would be confused. It is enough that a substantial number of them are likely to be confused: *PepsiCo v Atlantic Industries* (983/16) [2017] ZASCA 109 (15 September 2017) para 30 and *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA).
- [14] With fancy or “created” names, ie names not consisting of everyday words, it will be easier to prove confusion. However, in respect of a word in everyday use, and the possible confusion, it was said in *Bata Ltd v Face Fashions CC & Another* 2001 (1) SA 844 (SCA) para 10: “It is an ordinary word in everyday use, as distinct from an invented or made-up word, and it cannot follow that confusion would probably arise if it is used in combination with another word.”: See also *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* (164/2015) [2016] ZASCA 77 (27 May 2016) para 10.
- [15] In *Orange Brand Services Ltd v Account Works Software (Pty) Ltd* (970/12) [2013] ZASCA 158 (22 November 2013) the Supreme Court of Appeal said (para 10), with reference to *Kerly’s Law of Trade Marks and Trade Names* (14th ed para 17–

23) that “whether there is a likelihood of deception or confusion is a question of fact, and for that reason decided cases in relation to other facts are of little assistance, except so far as they lay down any general principle.”

- [16] In respect of s 11(2)(c)(i) that requires that a name must not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company is part of, or associated with, any other person or entity, the test, which would be the same as “reasonably mislead”, as in the case of passing-off, should be: “. . . a reasonable likelihood that ordinary members of the public, or a substantial section thereof, may be confused or deceived into believing that the goods or merchandise of the former are the goods or merchandise of the latter or are connected therewith. Whether there is such a *reasonable likelihood of confusion or deception* is a question of fact to be determined in the light of the particular circumstances of the case.” *Adidas AG and Another v Pepkor Retail Limited* (187/12) [2013] ZASCA 3 (28 February 2013) para 28. It is not necessary to find that all or most consumers would be confused. It is enough that a substantial number of them are likely to be confused: *PepsiCo v Atlantic Industries* (983/16) [2017] ZASCA 109 (15 September 2017) para 30 and *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA).
- [17] It is not necessary to separately determine if the name of the respondent contravenes s 11(2)(c). In *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA) para 16 the Supreme Court of Appeal said that the requirements of s 11(2)(b) in respect of “confusingly similar” and that of s 11(2)(c) in respect of “reasonably mislead” are the same. It must however added that the ambit of these two sections differs because s 11(2)(b) refers to s 11(2)(a), which are names, trade marks or expressions, while s 11(2)(c)(i) refers to an incorrect belief that the person is part of or associated with any other person or entity. In the latter case the test is not the name, trade mark, word or expression in s 11(2)(a), but the person or entity. Therefore, if a person or entity uses eg unique descriptive words not contained in its registered company name, as one example, and a name is registered that contains those words, it could be a transgression of s 11(2)(c).

[18] “SAMRO” is an acronym and there is no such word in the English language. The principles as to fancy or created names should therefore be applicable.

[19] The incorporation of “SAMRO” in the name of the respondent will be *confusingly similar* for the reasonable person to the name of the applicant and would therefore not comply with s 11(2)(b) and, per definition, based on *Lucky Star Ltd v Lucky Brands (Pty) Ltd and Others* 2017 (2) SA 588 (SCA), also not with 11(2)(c).

FINDING and ORDER

[20] The proffered explanations for “good cause” under s 160(2)(b) appear to be reasonable and, for the most, logical and practical.

[21] For the reasons clearly set out above it would seem that there will not be prejudice to the respondent, and even if it were probable, the respondent had the opportunity to convince the Tribunal to the opposite.

[22] The respondent’s name does not comply with ss 11(2)(b) and 11(2)(c) of the Companies Act.

[23] The respondent is directed in terms of s 160(3)(b)(ii), to choose a name which does not consist of, or incorporate, “SAMRO” or any version thereof.

[24] The respondent is to file a notice of an amendment of its Memorandum of Incorporation, within 60 days of receipt of this order in order to change its name as per para [23] above.

[25] The belated prayer in the default application was that: “In the interim, on the basis that the order in paragraph 1 above [as per the CTR 142] is unlikely to be effective, an order directing the Companies Commission (sic) to manually change the offending name to 2012/106461/07 (Pty) Ltd, to remove the element SAMRO.”

[26] If this order was possible as discussed in para 25 of the interim ruling in terms of

the powers of the Tribunal as expressly provided for in the Act, and I make no finding in this respect, the Companies and Intellectual Property Commission should at least have been added as a respondent. This was not done.

Prof P.A. Delpont

COMPANIES TRIBUNAL: MEMBER
20 September 2018